A **WAN MOHD AZMAN HASSAN**

v.

PP

B FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASHIM YUSOFF FCJ
ABDULL HAMID EMBONG FCJ
[CRIMINAL APPEAL NO: 05-75-2008 (T)]
C 25 MAC 2010

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Penal Code - Section 34 - Trafficking in 1884.16 grammes ganja in furtherance of a common intention - Negotiations for sale of dangerous drugs occurring*
D *on two separate occasions - Appellant only actively involved on first occasion - Whether both occasions to be taken as single transaction - Whether common intention established*

CRIMINAL PROCEDURE: *Defence - Entrapment - Entrapment not a substantive defence - Onus on accused to prove that he committed offence*
E *due to entrapment - Whether accused was an "unwary innocent" - Whether entrapment established*

CRIMINAL PROCEDURE: *Prosecution - Witnesses - Agent provocateur - Whether evidence of agent provocateur must be subjected to*
F *balancing exercise to determine weight - Whether evidence of agent provocateur may be excluded in exercise of judicial discretion - Whether improperly or unfairly obtained evidence admissible under s. 40A Dangerous Drugs Act 1952*

G ***EVIDENCE:*** *Agent provocateur - Admissibility of evidence - Whether evidence of agent provocateur must be subjected to balancing exercise to determine weight - Whether evidence of agent provocateur may be excluded in exercise of judicial discretion - Whether improperly or unfairly obtained evidence is admissible under s. 40A Dangerous Drugs Act 1952*

H One Police Det. Kpl. Mahmood (SP3) acted as an agent provocateur and posed as a drugs purchaser. SP3 was introduced to the appellant. At their first meeting on 12 April 1999, the appellant introduced one Pak Ya to SP3. After some discussion, Pak Ya
I showed SP3 some drugs which were in his car. However SP3 refused to buy the drugs then. SP3 told the appellant and Pak Ya that he

wanted to purchase 2 or 3 kilograms of ganja. On 20 April 1999, Pak Ya called SP3 on the latter's handphone and told SP3 that 2 kilograms of ganja were available and agreed on a delivery location. SP3 informed his superior of this and a trap was set for the appellant and Pak Ya. On the agreed day, the appellant and Pak Ya arrived at the appointed delivery place. SP3 was told that the drugs were in the car driven by the appellant. SP3 then went over to the car and opened its back door to inspect the drugs. He could smell the odour of ganja as he opened the door. SP3 then walked back to his car. As he did so he gave the pre arranged signal to the police ambush team who had taken position in the vicinity. The police team immediately acted to pounce on the appellant and Pak Ya. Both of them were seen to be pale and shaking with fear upon being accosted by the police. The appellant and Pak Ya (who had since died) were convicted for a trafficking of drugs charge under s. 39B of the Dangerous Drugs Act 1952 (the Act). On appeal, the Court of Appeal upheld the conviction. Hence this appeal. The appellant raised the following arguments in this appeal: (a) whether the trial judge should subject the evidence of SP3, the agent provocateur, to a balancing exercise to determine its weight; and (b) that since the transactions were in two parts where the appellant played no active role in the "2nd transaction", these cannot be taken together to find that a common intention existed between the appellant and Pak Ya in committing the offence.

Held (dismissing the appeal and affirming the conviction and sentence)

Per Abdull Hamid Embong FCJ delivering the judgment of the court:

(1) Under s. 40A of the Act, the evidence of the agent provocateur cannot be excluded in the exercise of judicial discretion. An otherwise admissible evidence such as this one under s. 40A of the Act does not become inadmissible merely because it had been improperly or unfairly obtained. Section 40A(2) of the Act affirms this admission notwithstanding any other laws, written or otherwise, to the contrary. He may thus relate the full story of what happened in his negotiations with the drugs seller and any statements made by the latter to him shall be admissible in evidence. (para 15)

(2) The common law position that entrapment is not a substantive defence remains the law. In any event, it is for the appellant to prove that he committed this offence as a result of an

A entrapment. This can only be determined from the facts to be evaluated by the trial court. In other words it is a question of fact. As there was no finding of facts on this issue by the trial court the issue of entrapment as a defence did not arise in this case. On this point alone, it demolished the first argument
B raised by the appellant. For the defence to operate at all, the appellant needed to show that he was actually an "unwary innocent" who would not, but for the entrapment, have committed this offence. The facts however show that the appellant was a person with an opposite disposition; *ie*, that of
C an "unwary criminal" who readily participated in the offence. In this case, at worst, SP3's action can only be described as soliciting the appellant to supply the drugs. There was no entrapment as such. (paras 26 & 27)

D **(3)** In the fight against the drug menace, Parliament has deemed it fit that evidence of an agent provocateur be admissible without any restrictions. The trial judge is no longer vested with a discretion to exclude such evidence. The court is only to interpret legislations and not to add new elements especially
E when the words in statutes are clear and unambiguous. There is thus no further need to subject that evidence to any balancing exercise as proposed by learned counsel in his submission. (paras 32 & 33)

F **(4)** It was the findings of both courts below that the so called "2nd transaction" was part of and formed a continuation of the "1st transaction" for the sale and purchase of the drugs in which the appellant took an active part. Although there was no negotiation between the appellant and SP3 under the "2nd
G transaction", this did not mean that the appellant was not involved in the trafficking of those drugs. Negotiations were completed by the appellant and SP3 during the "1st transaction" although delivery of the drugs took place nine days later. Taken together, there was in fact only one transaction,
H arising from a single negotiation for the sale of the drug, in which the appellant actively participated. Being only one transaction common intention applied as found by the trial court as a fact. (paras 35 & 36)

I

Bahasa Malaysia *Translation Of Headnotes*

Dalam kes ini, seorang Det. Kpl Mahmood (SP3) telah bertindak sebagai agen provokatur dan berlakon sebagai seorang pembeli dadah. Di suatu perjumpaan pada 12 April 1999, perayu telah memperkenalkan seorang Pak Ya kepada SP3. Selepas mereka berbincang, Pak Ya telah menunjukkan kepada SP3 sejumlah dadah yang berada di dalam keretanya. SP3 bagaimanapun enggan membeli dadah tersebut pada waktu itu. Apapun, SP3 memberitahu perayu dan Pak Ya bahawa dia ingin membeli 2 atau 3 kilogram ganja. Pada 20 April 1999, Pak Ya menghubungi SP3 di telefon bimbit SP3 bahawa 2 kilogram ganja sudah ada tersedia dan mereka bersetuju mengenai tempat di mana ganja tersebut akan dihantar. SP3 memberitahu pegawai atasannya mengenai urusan pembelian ganja tersebut dan satu perangkap telah dibuat untuk memerangkap perayu dan Pak Ya. Pada hari yang dijanjikan, perayu dan Pak Ya tiba di tempat yang dipersetujui. Di situ, SP3 diberitahu bahawa ganja ada di dalam kereta yang dipandu oleh perayu. SP3 kemudian pergi ke kereta dan membuka pintu belakangnya bagi memeriksa dadah. Menurut SP3, beliau dapat menghidu bau ganja sebaik sahaja pintu kereta dibuka. SP3 kemudian berjalan semula menuju ke keretanya dan sekaligus memberi isyarat kepada pasukan serang hendap polis yang berada tidak jauh dari situ. Pasukan polis kemudian bertindak menangkap perayu dan Pak Ya di mana kedua-dua mereka kelihatan pucat dan menggeletar takut apabila ditangkap. Berikutnya, kedua-dua perayu dan Pak Ya (telah meninggal dunia) telah disabitkan kerana mengedar dadah di bawah s. 39B Akta Dadah Berbahaya 1952 ('Akta'). Di rayuan, Mahkamah Rayuan telah mengesahkan sabitan. Perayu merayu ke mahkamah ini dan membangkitkan isu-isu berikut: (a) sama ada hakim bicara harus mentaklukkan keterangan agen provokatur SP3 kepada satu pertimbangan bagi menentukan kekesanannya; dan (b) bahawa, oleh kerana transaksi mengandungi dua bahagian berasingan di mana perayu tidak memainkan peranan aktif dalam "transaksi kedua", maka adalah khilaf untuk melihat kepada kes ini secara keseluruhan bagi mendapati wujudnya niat bersama di antara perayu dan Pak Ya dalam melakukan kesalahan.

Diputuskan (menolak rayuan dan mengesahkan sabitan dan hukuman)

Oleh Abdull Hamid Embong HMP menyampaikan penghakiman mahkamah:

(1) Di bawah s. 40A Akta, keterangan agen provokatur tidak boleh diketepikan apabila melaksanakan budibicara kehakiman. Suatu keterangan yang seharusnya boleh diterima-masuk tidak menjadi tidak boleh diterima-masuk semata-mata kerana ianya diperolehi melalui cara-cara yang tidak adil atau tidak wajar. Seksyen 40A(2) Akta mengesahkan kebolehterimaan ini walaupun terdapat undang-undang lain, bertulis atau sebaliknya, yang bertentangan dengannya. Oleh itu, agen provokatur boleh mengemukakan sepenuhnya cerita mengenai apa yang berlaku dalam rundingannya dengan penjual dadah dan segala kenyataan yang dibuat oleh pihak terkemudian tersebut kepadanya adalah boleh diterima-masuk.

(2) Kedudukan di sisi common law bahawa pemerangkapan adalah bukan satu pembelaan substantif masih menjadi undang-undang terpakai. Apapun, menjadi tanggungjawab perayu untuk membuktikan bahawa beliau melakukan jenayah ini disebabkan oleh pemerangkapan. Ini hanya boleh dipastikan melalui fakta yang perlu dinilai oleh mahkamah bicara. Dengan kata lain, ia merupakan persoalan fakta. Dalam kes ini, tiada apa-apa dapatan fakta dibuat mengenai isu ini oleh mahkamah bicara, dan oleh kerana itu, isu pemerangkapan sebagai satu pembelaan adalah tidak berbangkit. Atas alasan ini sahaja, hujah pertama yang dibangkitkan perayu sudah boleh dipatahkan. Apapun, bagi membolehkan pembelaan ini berbangkit, perayu mesti menunjukkan bahawa beliau adalah sebenarnya adalah seorang "unwary innocent" yang tidak akan melakukan kesalahan tersebut jika tidak kerana pemerangkapan berkenaan. Fakta bagaimanapun menunjukkan bahawa perayu adalah seorang yang berperwatakan sebaliknya. Beliau menepati seorang "unwary criminal" yang memang berperanan melakukan kesalahan. Dalam kes ini, pada tahapnya yang terburuk, tindakan SP3 hanya boleh dianggap sebagai meminta perayu untuk membekalkan dadah. Tidak wujud pemerangkapan seperti yang didakwa.

(3) Dalam memerangi ancaman dadah, Parlimen merasakan wajar bahawa keterangan seorang agen provokatur harus boleh diterima-masuk tanpa apa-apa sekatan. Hakim bicara sudah tidak lagi mempunyai budibicara untuk mengenepikan keterangan sedemikian. Mahkamah hanya bertanggungjawab untuk mentafsir undang-undang dan bukan untuk menokok tambah elemen-elemen baru terutama apabila perkataan-perkataan yang terdapat di dalam statut adalah terang dan jelas. Tidak ada keperluan untuk mentaklukkan keterangan sedemikian kepada apa-apa 'balancing exercise' seperti yang dicadangkan oleh peguam terpelajar dalam hujahnya.

(4) Menjadi dapatan kedua-dua mahkamah di bawah bahawa apa yang dipanggil "transaksi kedua" adalah sebahagian dari dan kesinambungan kepada "transaksi pertama" bagi pembelian dan penjualan dadah di mana perayu telah mengambil peranan yang aktif. Walaupun tidak terdapat perundingan di antara perayu dan SP3 di bawah "transaksi kedua", itu tidak bermakna bahawa perayu tidak terlibat dengan pengedaran dadah tersebut. Perundingan telah pun disempurnakan oleh perayu dan SP3 semasa "transaksi pertama" walaupun penghantaran dadah hanya berlaku sembilan hari kemudian. Dilihat secara keseluruhan, hanya terdapat satu sahaja transaksi, yang berbangkit dari satu perbincangan bagi penjualan dadah, di mana perayu terlibat secara aktif. Dengan kewujudan hanya satu sahaja transaksi, maka niat bersama terpakai selaras dengan dapatan fakta yang dibuat oleh hakim bicara.

Case(s) referred to:

Azahan Mohd Aminallah v. PP [2005] 1 CLJ 374 CA ***(refd)***
Emperor v. Chaturbhuj Sahu 1 LR 38 Cal 96 ***(refd)***
Goh Ching Ang v. PP [1999] 1 CLJ 829 FC ***(refd)***
Goh Lai Wak v. PP [1994] 1 SLR 748 ***(refd)***
Jacobson v. US 503 US 540 (1992) ***(refd)***
Mathews v. US 485 US 58 (1998) ***(refd)***
PP v. Han Kong Juan & Ors [1983] 1 CLJ 245; [1983] CLJ (Rep) 773 HC ***(refd)***
R v. Latif [1996] 1 WLR 104 ***(refd)***
R v. Loosely [2001] UKHL 53 ***(refd)***
R v. Mortimer [1911] 80 LJ KB ***(refd)***
R v. Sang [1980] AC 402 ***(refd)***
R v. Smurthwaite & R v. Gill [1994] 1 All ER 898 ***(refd)***
Rex v. Mullins, 3 Cox Cr Cases 526 ***(refd)***
Teja Singh & Mohamed Nasir v. PP [1949] 1 LNS 96 HC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 39B, 40A(1), (2)
Evidence Act 1950, ss. 14, 15, 27

Police and Criminal Evidence Act 1984 [UK], s. 78

Other source(s) referred to:
Augustine Paul, *Evidence Practice and Procedure,* 3rd edn

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Ahmad Bache DPP

[Appeal from Court of Appeal, Criminal Appeal No: T-05-23-2003(B)]

Reported by Amutha Suppayah

JUDGMENT

Abdull Hamid Embong FCJ:

[1] The appellant and a co-accused (one Pak Ya, now deceased) were convicted for a trafficking of drugs charge under s. 39B of the Dangerous Drugs Act 1952 (the Act). On appeal, the Court of Appeal upheld the conviction.

Briefly, the facts relevant to this appeal are as follows:

[2] One Police Det. Kpl. Mahmood bin Nor (SP3) acted as an agent provocateur and posed as a drugs purchaser. SP3 was introduced by another police personnel to an informer who in turn introduced him to a second informer. The second informer introduced SP3 to the appellant on 12 April 1999.

[3] In their discussion, at a restaurant in Jerteh, SP3 informed the appellant that he wanted to purchase one kilogram of ganja. The appellant agreed to supply SP3 the drugs the same day at 9.30pm, at the same restaurant where they held their negotiation. That night at the appointed time and place SP3 met up with the appellant and Pak Ya was introduced to him by the appellant. After some discussion, Pak Ya told SP3 that the drugs were in the car. However the appellant and Pak Ya dare not transact the sale of the drugs at the restaurant and asked SP3 to follow them to another place. After following the appellant and Pak Ya for some 3 kilometers, the appellant stopped the car he was driving. The appellant then showed to SP3 a packaging containing the drugs.

SP3 however refused to accept it stating that he had to go to Kota Bharu that night. SP3 instead told the appellant that he now wished to purchase 2 or 3 kilograms of ganja at RM1,900 per kilogram.

[4] On 20 April 1999, Pak Ya called SP3 on the latter's handphone and told SP3 that 2 kilograms of ganja were available. The next day, Pak Ya again called SP3 and they agreed on the delivery of the drugs. SP3 informed his superior of this and a trap was set for the appellant and Pak Ya. At 1.25pm that day, the appellant and Pak Ya arrived at the appointed delivery place ie, at the Esso petrol kiosk in Kemaman. SP3, who was tailing the car driven by the appellant, stopped behind that car. Pak Ya alighted from the car he was riding and approached SP3. SP3 was told that the drugs were in the car driven by the appellant. SP3 then went over to the car and opened its back door to inspect the drugs. He could smell the odour of ganja as he opened the door. SP3 then walked back to his car. As he did so he gave the pre arranged signal to the police ambush team who had taken position in the vicinity. The police team immediately acted to pounce on the appellant and Pak Ya. Both of them were seen to be pale and shaking with fear upon being accosted by the police. Both were promptly arrested and the drugs seized.

[5] Scientific analysis confirmed the drugs to be ganja, weighing 1884.16 grammes, now the subject of the charge faced by the appellant.

[6] Learned counsel of the appellant raised two arguments in this appeal. These two issues he said were not raised before, either at the trial stage or the intermediate appellate stage. He however stated that as these are points of law they may still be considered by the apex court. We allowed him to argue those points. We now address those points.

Whether The Trial Judge Should Subject The Evidence Of SP3, The Agent Provocateur, To A Balancing Exercise To Determine Its Weight

[7] Admissibility of the evidence of an agent provocateur is not in issue. Neither is his credibility as a witness. Statute has provided for this in the form of s. 40A of the Act which states:

A 40A (1) Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under this Act if the attempt to abet or abetment
B was for the sole purpose of securing evidence against such person.

(2) Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, and that the agent provocateur is a police officer whatever his rank or any officer of customs, any statement, whether oral or in writing made to an
C agent provocateur by any person who subsequently is charged with an offence under this Act shall be admissible as evidence at his trial.

Agent Provocateur

[8] The use of agent provocateurs, or undercover or police spies
D is now a common method utilised by the police in flushing out and ultimately apprehending drugs traffickers. It must be remembered that such covert activities of these drug traffickers are carried out with a high degree of secrecy that, without using this technique of surveillance and investigation, it may be impossible for anti-drugs
E law enforcers to penetrate into this nefarious underworld activity and identify who are the perpetrators. Lord Alverstone CJ in *R v. Mortimer* [1911] 80 LJ KB p. 77, commenting on evidence adduced by one who himself participated in committing the offence made this observation:

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> I do not like the police traps any more than does anybody else; but at the same time there are some offences the commission of which cannot be found out in any other ways, and unlawful acts done in consequence of the trap are none the less unlawful.

G **[9]** In a typical police undercover operation scenario (as happened in this case) the police would receive information from its informer of a drug trafficking activity. An agent provocateur, normally himself a police officer, will then be assigned to undertake what is called a "sting operation". The agent provocateur will get in touch
H with the informer. The informer will then arrange for an introduction and meeting between the agent provocateur, (who will play the role of a drug-buyer) and the drug trafficker. The informer will take no further active role and normally disappear. Negotiations will then take place between the agent provocateur and the drug
I trafficker where the amount of drugs to be supplied, its price and place of delivery will be discussed and agreed upon. The agent

provocateur himself thus takes an active role in the commission of the offence. Both parties become willing participants in that offence. This is what is meant by the phrase 'to abet the commission of the offence' as found in s. 40A(1) of the Act. The agent provocateur's role is to uncover the offence and gather evidence to be later given at the trial against the trafficker. This, as discussed later in this judgment, is however not an entrapment that gives rise to a legitimate defence.

[10] An agent provocateur may thus be defined as one who provokes or suggests the commission of an offence to another person hoping that the latter will go along with his suggestion so that the other person may be convicted of the offence the agent provocateur suggested. In the *Dictionary of Law* by LB Curzon, he is defined as a person:

> who entices another to commit an express breach of the law which he would not otherwise have committed and then proceeds to inform against him in respect of such offence.

[11] The evidence of an agent provocateur is however not that of an accomplice's and as such requires no corroboration (see *Teja Singh & Mohamed Nasir v. PP* [1949] 1 LNS 96; also *Goh Lai Wak v. PP* [1994] 1 SLR 748). In that case, Spencer Wilkinson J makes the following distinction between an agent provocateur and an accomplice by making reference to this passage from *Emperor v. Chaturbhuj Sahu* 1 LR 38 Cal. 96:

> A person who makes himself an agent for the prosecution with the purpose of discovering and disclosing the commission of an offence, either before associating with wrong-doers or before the actual perpetration of the offence, is not an accomplice but a spy, detective or decoy whose evidence does not require corroboration, though the weight to be attached to it depends on the character of each individual witness in each case. But a person who is associated with an offence with a criminal design, and extends no aid to the prosecution till after its commission is an accomplice requiring corroboration.

Another passage was also quoted from Maule J's judgment in *Rex v. Mullins*, 3 Cox Cr. Cases 526, to draw this distinction and to hold that corroboration is unnecessary. Maule J said this:

> The government are, no doubt, justified in employing spies; and I do not see that a person so employed deserves to be blamed if he instigates offences no further than by pretending to concur with the perpetrators. Under such circumstances they are entirely

A distinguished in fact and in principle from accomplices, and although their evidence is entirely for the jury to judge of, I am bound to say that they are not such persons as it is the practice to require corroboration.

B **[12]** As for the creditworthiness of an agent provocateur as a witness Spencer-Wilkinson J in *Teja Singh* made the following remarks:

It appears from the extract above quoted that the learned author of Roscoe's Criminal Evidence classed agents provocateur in the same
C category as spies, informers and detectives. I have no doubt that there may be witnesses in any of these categories who may be wholly unworthy of credit but in my view the credit of any such witness depends upon the facts of each particular case and not upon the particular label which can be attached to him.

D **[13]** This observation of the creditworthiness of an agent provocateur is now enshrined in s. 40A(1) of the Act which now provides that presumption on creditworthiness.

[14] This presumption of being a creditworthy witness is of course
E rebuttable. It falls upon the defence then to adduce sufficient evidence for the court to conclude that the evidence of an agent provocateur is unworthy of credit. (See *PP v. Han Kong Juan & Ors* [1983] 1 CLJ 245; [1983] CLJ (Rep) 773 HC).

F **[15]** Under s. 40A of the Act, the evidence of the agent provocateur cannot be excluded in the exercise of judicial discretion (see *Evidence Practice and Procedure*, 3rd edn. by Augustine Paul). An otherwise admissible evidence such as this one under s. 40A of the Act does not become inadmissible merely because it had been
G improperly or unfairly obtained. Section 40A(2) of the Act affirms this admission notwithstanding any other laws, written or otherwise, to the contrary. He may thus relate the full story of what happened in his negotiations with the drugs seller and any statements made by the latter to him shall be admissible in evidence.

H In *R v. Smurthwaite & R v. Gill* [1994] 1 All ER 898, the English Court of Appeal (Criminal Division) in dismissing the appeals of two persons convicted of soliciting to murder founded on the evidence of an undercover police officer held as follows:

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A judge had no discretion to exclude otherwise admissible evidence merely on the ground that it had been obtained improperly or unfairly and the evidential requirement in s. 78 of the 1984 Act that prosecution evidence might be excluded having regard to the circumstances in which it was obtained had not altered the substantive rule of law that entrapment or the use of an agent provocateur did not *per se* afford a defence in law to a criminal charge. However, if the judge considered that in all the circumstances the obtaining of the evidence in that way would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it, he could exclude it. Accordingly, it was not open to the appellants to claim that had it not been for the undercover officers acting as agent provocateurs they would not have solicited the murder of their spouses and on the facts the tape recordings were in each case an accurate and unchallenged record of the actual offence being committed. They had accordingly been properly admitted in evidence.

[16] Also the propriety of obtaining the evidence with the use of an agent provocateur would not impair the fairness of the trial itself as this passage from Lord Diplock's judgment in *R v. Sang* [1980] AC 402 suggests. His Lordship said:

For the fairness of a trial according to law is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted. However much the judge may dislike the way in which a particular piece of evidence was obtained before proceedings were commenced, if it is admissible evidence probative of the accused's guilt it is no part of his judicial function to exclude it for the reasons.

[17] And Lord Salmon, in the same case stated the same proposition in a more forceful manner when he said:

A man who intends to commit a crime and actually commits it is guilty of the offence whether or not he was persuaded or induced to commit it, no matter by whom. This being the law, it is inconceivable that, in such circumstances, the judge could have a discretion to prevent the Crown from adducing evidence of the accused's guilt – for this would amount to giving the judge the power of changing or disregarding the law. It would moreover be seriously detrimental to public safety and to law and order, if in such circumstances, the law immunized an accused from conviction.

[18] Reverting to the main thrust of his submission, learned counsel stated that this issue is raised against the peculiar background facts of this case in that:

A (i) The appellant negotiated with SP3 only on 12-4-1999 ("the 1st transaction"). The 1st transaction was then aborted in the sense there was no delivery of the cannabis;

(ii) That in the transactions on 20-4-1999 and 21 April 1999 ("the 2nd transaction") there was absolutely no negotiations between
B the appellant and SP3. It was the 2nd accused (Ibrahim Nawang – now deceased ie, Pak Ya) who called SP3 as he had 2 kilograms of cannabis.

On the next day, that is, on 21-4-1999 the 2nd accused again called SP3 to conclude the delivery. At about 1 pm the 2nd accused again
C asked SP3 saying that he would be late. At the scene (Esso petrol kiosk) it was the 2nd accused who took the necessary steps to deliver the cannabis up to the point of SP3 giving the prearranged signal. The appellant's role on 21-4-1999 was that he was a mere driver of the car.

D

The learned trial judge relied on the 1st transaction to find possession (pg 1229 Appeal Record) and thereafter from possession to trafficking by relying on section 2 of the Act.

[19] It was submitted that an entrapment by SP3 had occurred.
E Learned counsel stated that since such evidence of entrapment is highly prejudicial, it is incumbent upon the trial court to do a "balancing exercise" before it can act on that prejudicial evidence. The balancing exercise requires the trial court to determine whether the prejudicial effect of the entrapment evidence outweighs its
F probative value. If the answer is in the affirmative then the trial court cannot act on it because it offends the principles of fairness. A misdirection had thus occurred in the trial.

Entrapment

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[20] The landmark decision of the U.S. Supreme Court in *Jacobson v. U.S.* 503 U.S. 540 (1992) (a prosecution for receiving child pornographic materials *via* the mail), which recognised entrapment as an affirmative defence in the federal courts, defined entrapment
H as:

> … when the Government **originate** a criminal design, **implant** in an innocent person's mind the disposition to commit a criminal act, then **induces** the commission of that crime so that the Government may prosecute.

I

The underlined words emphasise the crucial features for this defence to operate.

This 5-4 majority decision of the U.S. Supreme Court has been described by some academic critique as bringing the entrapment defence "back from the (almost) dead". In that case it was held that inducement is a threshold issue. Mere solicitation to commit an offence is not an inducement. Thus if the accused person promptly accepts an agent provocateur's offer of an opportunity to buy or sell drugs, this itself may establish the accused's predisposition (*Jacobson*'s case). He is thus, not induced.

[21] It is for the defence to prove that an inducement had occurred. This element is proven if the accused can show that:

(i) he is unduly persuaded, threatened, coerced, harassed or offered friendship or sympathy by the police/government agent, and

(ii) the government agent's conduct created a situation that an otherwise a law abiding person would commit an offence.

To determine entrapment a line thus needs to be drawn between trapping an "unwary innocent" and "an unwary criminal". An unwary criminal who readily avails himself of an opportunity to commit an offence, betrays his criminal predisposition. He would thus not be able to take advantage of this defence (see *Mathews v. U.S* 485 U.S 58 (1998)).

In *R v. Loosely* [2001] UKHL 53, the House of Lords describes this situation in this manner:

> If the defendant already had the intent to commit a crime of the same or similar kind, then the police did no more than give him the opportunity to fulfill his existing intent.

[22] In England, entrapment is not a substantive defence *(R v. Sang, supra)*. Learned counsel for the appellant in citing *Loosely*, urged this court to adopt the position taken by the House of Lords, in that case on the question of entrapment. That case considered the admissibility of entrapment evidence in the context of the English position.

[23] Section 78 of the English Police and Criminal Evidence Act 1984, empowers the court to exclude any evidence on the ground that its admission would have an adverse effect on the fairness of the proceedings. In *R v. Smurthwaite* [1994] 1 All ER 898, Lord Taylor of Gosforth CJ stated that "s. 78 has not altered that

substantive rule that entrapment itself does not provide a defence." Thus the evidence obtained by entrapment need not necessarily be excluded by the court.

[24] The House of Lords in *Loosely* however held that the court may grant a stay of proceedings (which has the same beneficial effect as an acquittal) as an appropriate response in the case of entrapment, on the ground that a "prosecution founded on entrapment would be an abuse of the court's process" (see the judgment of Lord Nicholls of Birkenhead).

[25] The development of remedies to entrapment under English law, both statutory and common law, now allows the court to either exclude evidence pursuant to s. 78 of the Police and Criminal Evidence Act 1984, or to grant a stay which the House of Lords in *Loosely* said is a preferred remedy. This judicial response it seems is based on the need to uphold the rule of law. "A defendant is excused, not because he is less culpable, although he may be, but because the police have behaved improperly (per Lord Nicholls of Birkenhead)". To prosecute in such circumstances would be an "affront to public conscience" (Lord Steyn in *R v. Latif* [1996] 1 WLR 104). The remedy is thus recognised to protect the integrity of the criminal justice system.

[26] Back home, our Evidence Act, does not provide for any exclusionary provision similar to that as in s. 78 of the English Police and Criminal Evidence Act 1984. In our view, the common law position that entrapment is not a substantive defence remains the law. The position taken by the High Court in *Kang Ho Juan* where it was pronounced that there is no place in Malaysian law to allow the so called defence of entrapment, is still good law here.

[27] In any event, it is for the appellant to prove that he committed this offence as a result of an entrapment. This can only be determined from the facts to be evaluated by the trial court. In other words it is a question of fact. As there was no finding of facts on this issue by the trial court the issue of entrapment as a defence does not arise in this case. On this point alone, it demolishes the first argument raised by learned counsel for the appellant. For the defence to operate at all, the appellant needed to show that he was actually an "unwary innocent" who would not, but for the entrapment, have committed this offence. The facts however show that the appellant was a person with an opposite disposition; ie, that

of an "unwary criminal" who readily participated in this offence. In this case, at worst, SP3's action can only be described as soliciting the appellant to supply the drugs. There was no entrapment as such.

Similar Facts Evidence, Discovery and the Agent Provocateur's Evidence

[28] Learned counsel likened the evidence of the agent provocateur to that of similar fact evidence under s. 14 and s. 15 of the Evidence Act 1950 and information leading to discovery under s. 27 of the Evidence Act 1950. He cited the case of *Azahan Mohd Aminallah v. PP* [2005] 1 CLJ 374 in support for the proposition that a balancing exercise in weighing the probative value of similar fact evidence against its prejudicial effect is required before the court can admit similar fact evidence.

[29] *Goh Ching Ang v. PP* [1999] 1 CLJ 829 was cited as authority not to admit prejudicial evidence which is of a trifling weight and by its admission would operate unfairly against the accused person.

[30] Let us quickly say that it is a fallacy to equate the evidence of an agent provocateur on equal footing with that of similar fact evidence or discovery information. We agree that under the two latter circumstances the court will need to do the balancing exercise on the evidence in the interest of a fair trial. However unlike the evidence under those two circumstances, the evidence of an agent provocateur is actually direct evidence on the commission of an offence. The purpose of adducing similar fact evidence and discovery information is also different. The former (under s. 14 Evidence Act) is to prove the existence of a state of mind of the accused, and the latter (under s. 27) to prove the veracity of the information received from the accused. The existence of the facts as a basis of that proof thus needs to be enquired into by the trial court to determine if anything said by the accused, although probative and relevant, is too prejudicial to be admitted as evidence.

[31] In the case of an agent provocateur's evidence however, the statutory approval for the admission of such evidence as governed by s. 40A of the Act, is indisputable. The need for admission of an agent provocateur's evidence has been alluded to earlier in this judgment. The special provision as found in s. 40A of the Act is provided to address this very need. The law too is silent on the need to subject such evidence to a balancing exercise.

[32] Learned counsel of the appellant urged this court to apply the balancing exercise requirement in the interest of fairness. But the principle of fairness cuts both ways. In the fight against the drug menace, Parliament has deemed it fit that such evidence of an agent provocateur be admissible without any restrictions. The trial judge is no longer vested with a discretion to exclude such evidence. The court is only to interpret legislations and not to add new elements especially when the words in statutes are clear and unambiguous.

[33] There is thus no further need to subject that evidence to any balancing exercise as proposed by learned counsel in his submission. The contention that this omission is a misdirection by learned trial judge therefore cannot be substantiated.

[34] In this appeal, there had been a concurrent findings of facts by both the trial court and the Court of Appeal in regard to the appellant being in direct possession of the drugs upon his arrest. That finding cannot now be disturbed. It was also the findings of both courts below that the so called "2nd transaction" was part of and formed a continuation of the "1st transaction" for the sale and purchase of the drugs in which the appellant took an active part. Although there was no negotiation between the appellant and SP3 under the "2nd transaction", in our view this does not mean that the appellant was not involved in the trafficking of those drugs. Negotiations were completed by the appellant and SP3 during the "1st transaction" although delivery of the drugs took place nine days later. It is therefore not wrong for the learned trial judge to also consider the "1st transaction" and found that the appellant participated in the trafficking of the drugs. Taken together, there was in fact only one transaction, arising from a single negotiation for the sale of the drug, in which the appellant actively participated.

Common Intention

[35] The second argument raised was that since the transactions were in two parts where the appellant played no active role in the "2nd transaction", these cannot be taken together to find that a common intention existed between the appellant and Pak Ya in committing this offence. The trial court had made a finding of fact that there was only one transaction. This finding was affirmed by the Court of Appeal. Being only one transaction common intention applied as found by the trial court as a fact. Having reviewed the facts and the reasons given by the trial judge in concluding that the

commission of this offence was done with a common intention, it is our finding that this contention of lack of common intention is without merit. We are satisfied that the learned trial judge had fully and properly evaluated the evidence in making the conclusion that he did. We are compelled to accept those findings.

[36] We can find no flaw in the finding made by the learned trial judge on this issue. Based on the facts the judge concluded that both the appellant and Pak Ya had acted in coercion, with a common intention to traffick in the drugs. This is not a legal issue. As earlier said, we find no error in the learned judge's approach in taking both transactions as a single act where both the appellant and Pak Ya had formed a common intention to commit this offence. The learned judge made his finding in this passage, which we now affirm:

> Dalam kes semasa, daripada keterangan persekitaran, terdapat keterangan yang boleh dipercayai bahawa OKT1 dan OKT2 telah bertindak bersepadu dalam melakukan kesalahan pengedaran dengan membawa cannabis untuk diserah dan dijual kepada SP3. Keterangan-keterangan itu adalah seperti berikut:
>
> (i) OKT1 dan OKT 2 telah terlibat dalam rundingan awal jual beli dadah dengan SP3 pada 12.4.99 semasa dalam sebuah restoran.
>
> (ii) SP3 telah memesan 2 - 3 kilogram cannabis dengan OKT1. OKT2 telah membuat tawaran dengan menghubungi SP3 mengatakan dia mempunyai 2 kilogram cannabis dan bersetuju untuk menyerah cannabis di Kemaman.
>
> (iii) OKT1 dan OKT2 bersama-sama membawa cannabis seperti dijanjikan ke Kemaman untuk diserah dan dijual kepada SP3.
>
> Mengenai pemakaian prinsip niat bersama, Kang Hwee Gee H dalam kes *Public Prosecutor v. Krishna Rao a/l Gurumurthi* [2000] 1 MLJ 274 di ms 308, telah memetik perenggan 289 Mallal's Current Law yang berkata:
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> (ii) All that was necessary for the prosecution to prove was that there was in existence a common intention between all the persons involved to commit a criminal act and that the act which constituted the offence charged (the 'criminal act' referred to in s. 34 of the Penal Code) was committed in furtherance of that criminal act. It was not necessary to prove that there had to be a common intention to commit the crime actually committed.

A Jadi, menggunapakai prinsip tersebut kepada fakta kes sekarang, jelas bahawa, walaupun peranan yang telah dimainkan oleh OKT1 berbeza dengan tindakan yang telah diambil oleh OKT2, namun tindakan mereka berdua adalah sama, iaitu untuk melakukan satu kesalahan pengedaran dadah cannabis yang mereka telah lakukan.

B **[37]** For these reasons, we dismiss this appeal and affirm the conviction and sentence.

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